No. 4302.

In The United States Circuit Court of Appeals

For The Ninth Circuit

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY, L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY, SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation, UNION OIL COMPANY OF CALIFORNIA, a Corporation, SEATTLE HARDWARE COMPANY, a Corporation, and SAMUEL CLARK,

Appellants,

v.

KUNKLER TRANSPORTATION & TRADING COMPANY, a Corporation, and FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Appellees.

BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

PHILIP D. MACBRIDE,
Proctor for C. R. Hooper, doing business as Hooper Manufacturing Company, and for L. H. Coolidge and C. V. Hull, co-partners as L. H. Coolidge Company.

HASTINGS & STEDMAN,
Proctors for Seattle Shipbuilding & Dry Dock Company.

STRATTON & KANE,
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THE ARGUS PRESS, SEATTLE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

STATEMENT OF THE CASE.

This cause was commenced by the Seattle Shipbuilding & Dry Dock Company filing a libel against

the Steamer "Dauntless" on July 19, 1923, for labor and material for repairs, in the sum of $4,344.92.

On the same date, the vessel was seized by the United States Marshal.

On the next day, July 20, 1923, a claim was interposed by the Kunkler Transportation & Trading Company, and a bond was executed as follows (omitting caption and signatures):

> "WHEREAS, process of the above entitled court was issued on the 19th day of July, 1923, commanding the marshal of said district to seize and take into his possession the steamship "Dauntless", her tackle, apparel, etc., on account of the claim of the libellant, in the sum of Four Thousand Three Hundred Forty-four and 92/100 Dollars, and in obedience to the writ the said marshal did seize and take said vessel and is now in possession thereof,
>
> "AND WHEREAS, it is agreed between the proctors of the libellant and the proctors of the claimant of said vessel that upon the giving of a bond, with surety, in the sum of Six Thousand Dollars ($6,000.00), said vessel may be released and returned to the claimants. Now, therefore,
>
> "KNOW ALL MEN BY THESE PRESENTS, That we, Kunkler Transportation & Trading Company, a corporation of the State of Washington, with its principal office in Seattle, in said District, as principal, and Fidelity & Deposit Co., of Maryland, as surety, are held and firmly

bound unto the said libellant, in a sum not exceeding Six Thousand Dollars ($6,000.00), for the payment of which, well and truly to be made, we do hereby bind ourselves, our successors, assigns, executors, administrators and heirs, firmly and severally by these presents.

"Dated this 20th day of July, 1923.

"The condition of the above obligation is such, however, that if the above-bounden principal shall either pay any judgment and abide by any and all orders and decrees made by said court in the above entitled cause or in lieu thereof shall redeliver said vessel, with her tackle, apparel and furniture, into the possession of the said marshal, and abide by any such judgment as the same may be rendered, or any orders as the same may be made, then this obligation be void; otherwise to be and remain in full force and effect."

and the vessel was thereupon delivered to the claimant.

On August 7, 1923, a written tender of redelivery to the marshal was served upon the marshal and proctors for the libellant, and filed in court on August 8, 1923.

On August 15, 1923, the court directed redelivery to the marshal upon stipulation of proctors for claimant and libellant, in which stipulation it was recited that the claimant and surety tendered and offered to redeliver the "Dauntless" to the marshal on August 7, 1923, and in so doing, they contended

that they were performing the conditions of the bond. The stipulation further recited that libellant contended that the bond could not be discharged in any such manner, and further recited that the principal and surety desired that the vessel be taken into the custody of the marshal and held subject to the further order of the court, and that the court might enter its order directing the marshal to accept the custody and delivery of said vessel, "provided, however, that such acceptance and delivery shall not effect, or in any manner prejudice, the rights of any parties hereto as they now exist."

On August 8, 1923, prior to the redelivery of said vessel to the marshal, an independent suit was commenced by C. R. Hooper, and the vessel was seized on monition duly issued and subsequently sold after default on order of sale duly entered by the court.

Subsequently, L. H. Coolidge and C. V. Hull intervened in said second cause, and the other intervenors intervened in said first cause.

On motion of intervenor, Union Oil Company of California, the two causes were consolidated.

The Fidelity & Deposit Company of Maryland, surety of the claimant on the bond for delivery of the vessel, on August 28, 1923, filed its petition praying that it might be dismissed from the action, and that the bond or stipulation executed by such surety company should be cancelled and the surety company discharged and exonerated from all further liability in the matter.

Upon trial had, proof was offered in behalf of the

claims of the respective libellants and intervening libellants, and thereafter, by memorandum decision, the court directed a decree in favor of libellant and intervening libellants for the amounts claimed excepting that the claim of intervening libellants, Coolidge & Hull, was deducted from the claim of the libellant, Seattle Shipbuilding & Dry Dock Company, and the court directed that the surety be released.

A decree was subsequently entered in conformity with the court's opinion, and the libellants and intervening libellants appeal on the sole contention that the court erred in its decision that the surrender of the vessel by the claimant satisfied and discharged the delivery bond executed by the claimant and the Fidelity & Deposit Company of Maryland.

SPECIFICATION OF ERROR

The court erred in holding and deciding that the redelivery of the vessel by the claimant and surety released the bond and discharged the surety.

ARGUMENT

1. The release of the "Dauntless" from arrest by the marshal was procurable by the claimant only by virtue of Sec. 941 of the Revised Statutes, providing for a bond to the marshal, or by stipulation under the rules of the court.

U. S. Supreme Court Admiralty Rule 12;
District Court Admiralty Rule 21.

2. The stipulation or bond given for release of

the vessel is construed according to the rule of the court or the statute.

Benedict on Admiralty, 4th Ed. Sec. 420, p. 286;

Lane v. Townsend, Fed. Case, No. 8054, 14 Fed. Cas. 1090 at 1091.

3. The claimant, receiving the vessel from the marshal on the execution of delivery bond, received her *cum onere* released from the claim of the libellant on which she was seized, but subject to all other liens.

Benedict on Admiralty, (4th Ed.) Sec. 421;

The Langdon Cheves, 2 Mason, 58, Fed. Cas. No. 8064. 14 Fed. Cas. 1111;

The Palmyra, 12 Wheat. 1, at p. 10.

4. After the release of the "Dauntless" on the bond, the libellant, Seattle Shipbuilding & Dry Dock Company, could not have caused her second arrest for the same cause.

The Wild Ranger, Brown & Lush 84 (quoted in *The Josephine* Fed. Cas. 12663);

Home Ins. Co. v. The Concord, Fed. Cas. No. 6659. 12 Fed. Cas. 448;

Senab v. The Josephine, Fed. Cas. No. 12663. 21 Fed. Cas. 1075;

The Union, 4 Blatch. 90; Fed. Case No. 14346; 24 Fed. Cas. 535;

The Wm. F. McRae, 23 Fed. 557;

The Mutual, 78 Fed. 144;

The Cleveland, 98 Fed. 631.

In *The Wild Ranger*, Dr. Lushington states:

> "Now, the bail given for the ship in any action is the substitute for the ship; when the bail is given, the ship is immediately released from that cause of action and cannot be arrested again for that cause of action. Also, if the ship is sold in another action, the proceeds, save by the operation of some act of parliament, are liable only to the payment of liens. In this case then, after the bail was taken, the ship herself never could have been made liable for damage or interest."

In *The Union, supra,* Circuit Justice Nelson states, in commenting upon the order of the court for claimant's redelivery of the vessel to the marshal:

> "This order assumes that the discharge of the vessel from the seizure, and her delivery to her owners, was not absolute, but that she is still subject to the exertion of the power of the court for the purpose of satisfying any decree. No case has been furnished in which this power of the admiralty has been exerted; and, on principle, I do not well see how it can be maintained. The vessel, after being discharged from the arrest upon the giving of the bond or stipulation, returns into the hands of the owner, subject to all previously existing liens or charges, the same as before the seizure, except as respects that on account of which the seizure was made. She is also subject to any subsequently accruing

liens or charges in the hands of her owner, or in the hands of any person to whom she may have been transferred. The redelivery, therefore, of the vessel, if permitted, or enforced, must necessarily be a redelivery subject to all these existing or subsequently accruing liens, and, also, to the rights of any *bona fide* purchasers, if a sale has in the meantime taken place. The complication and embarrassment growing out of the exercise of the power, if sanctioned, are apparent, and this, doubtless, accounts for the absence of any precedent in the books. In the present case the vessel has been sold, and has passed into the hands of the purchaser, and his title is, I think, undoubted. It is so for the reason that, on the discharge of the vessel, on the giving of the bond or stipulation, she is thereby discharged from the lien or incumbrance which constituted the foundation of the proceeding against her, the security taken being the substitute for the vessel."

In *Home Ins. Company v. The Concord, supra,* referring to an order remanding the vessel to the marshal, the court stated:

"The next and remaining question is as to the validity of the order remanding the vessel. I shall not stop to argue the question. It seems to be too well settled, both in this country and in England, to need further elucidation, that the vessel on being discharged from arrest upon the giving of the bond or stipulation, returns

into the hands of her owner, discharged from the lien incumbrance which constituted the foundation of the proceedings against her forever; and, for all purposes whatsoever, the surety taken being as a substitute for the vessel, and the court has no power or jurisdiction over her thereafter in the same suit for the same cause. *The Union* (Case No. 14346); *The White Squall* (Id. 17570); *The Kalamazoo*, 9 Eng. Law & Eq. 557, 560; 15 Law Rep. 563."

In *The William F. McRae, supra*, Judge Brown, in determining that a second libel could not be filed in the second cause of action, after the discharge upon delivery bond in the first action, says:

"That a vessel discharged from arrest upon admiralty process by the giving of a bond or stipulation for her value, or for the payment of the amount claimed in the libel, returns to her owner freed forever from the lien upon which she was arrested, and can never be seized again for the same cause of action, even by the consent of parties, is a proposition too firmly established to be open to question. *The Kalamazoo*, 9 Eng. Law & Eq. 557; *The Wild Ranger*, Brown & Lush, 84; *The Union*, 4 Blatchf. 90; *The White Squall*, 4 Blatchf. 103; *The Old Concord*, 1 Brown, Adm. 270; *The Josephine*, 4 Cent. Law J. 262."

In *The Cleveland, supra*, Judge Hanford held that even after a dismissal of the libel without

prejudice, following release of vessel on bond, the vessel could not be again seized. Judge Hanford reviews the earlier decisions and concludes his opinion as follows:

> "Upon the authority of the decisions above referred to, and other cases to which they refer, I am obliged to hold that the release of the steamship Cleveland in the former suit against her, by these libellants, discharged her absolutely from liability to answer the demands of the libellants in this case, and that the proviso in the order dismissing the former suit that the same was made without prejudice can have no other effect, as a saving clause, than to prevent the decree of dismissal from being set up in bar of subsequent suits *in personan* against the master or owners of the vessel. Motion to dismiss granted."

5. After she has once been discharged upon bond, the court has no power to order the redelivery of the vessel to the marshal to answer the claim of the libellant.

The Union, Fed. Cas. No. 14346; 24 Fed. Cas. 535;
The Cleveland, 98 Fed. 631;
The Mutual, 78 Fed. 144.

6. The bond was for the benefit of the libellant, Seattle Shipbuilding & Dry Dock Company, only,—the other libellants being free to libel the vessel for their claims.

The Oregon, 158 U. S. 186;

The Wanata, 95 U. S. 600.

7. Judge Neterer, in his decision, rests his authority therefor on *The William F. McRae*, 23 Fed. 557, and *United States v. Ames*, 99 U. S. 35. The quotation in his opinion from 23 Fed. 558, attributed to Judge Brown, is a statement by Judge Brown of the holding of Judge Blatchford in *The Thales*, 3 Ben. 327, Fed. Case No. 13855, as appears from the following quotation on page 883 of 23 Fed. Cas.:

> "If the court has no power to order a vessel which has been fairly discharged, on a bond or stipulation, from an arrest, back into the custody of the marshal, in the same suit, as was held in the case of *The Union* (*supra*), and also in the case of *The White Squall* (Case No. 17570), *a fortiori*, it has no power to order her to be arrested a second time, in another suit, for the same cause of action. To order her back into the custody of the marshal, in the same suit, when she has been fairly, and not improvidently, or by fraud, or mistake, discharged by bonding, is simply to arrest her a second time for the same cause of action, after she has been discharged by bonding, from the lien or charge in respect of which she was arrested. To arrest her, under the same circumstances, in a new suit, for the same cause of action, is to do nothing more or less. In *The Kalamazoo*, 9 Eng. Law & Eq. 557, 560, Dr. Lushington says: 'It is perfectly competent to take bail to the full

value; but the effect of taking bail is to release the ship in that action altogether. It would be perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship, and, when a ship is once released upon bail, she is altogether released from that action."

"The libellant urges, that the fact that the former suit was discontinued, and that the costs therein were paid, before the present suit was brought, remits the libellant to all the rights which he had at the time he instituted the former suit, and that such discontinuance operates to make the arrest of the vessel, in the present suit, an original arrest, and not a second arrest. This view overlooks the fact that the vessel was discharged on bond on the 10th of July, 1857, and that the former suit was not discontinued until the 4th of March, 1858. The rights of the parties interested in the vessel were fixed by the bonding and discharge, and she then returned into their hands freed from the lien or charge for which she had been arrested, and from liability to be again arrested therefor."

so that the quotation by Judge Neterer is not authority for the conclusion reached especially when considered in connection with the quotation heretofore appearing in this brief from Judge Brown's decision. Nor is the *United States v. Ames*, 99 U. S. 35, an authority in support of the court's decision

as appears by a study of *United States v. The Haytion Republic*, 154 U. S. 118, 38 L. Ed. at p. 933, where Mr. Justice White says:

> "It is true that, where a fraudulent appraisement has been had, or a fraudulent or illegal bond has been given, in an admiralty proceeding, the court has the power to recall the vessel for the purpose of requiring an honest appraisement and of exacting a legal bond. *United States v. Ames*, 99 U. S. 35; *The Union*, 4 Blatchf. 90; *The Favorite*, 2 Flip. 87; *The Thales*, 3 Ben. 327; 2 Parsons, Shipping, 411. This special power, however, to meet a particular contingency does not affect the general rule, or imply that the vessel, after a legal bond has been given, remains in the exclusive custody and jurisdiction of the court. *The Union, supra.*"

Judge Neterer could not have been mindful of his own decision in *The Comanche*, 1923 A. M. C., 201, wherein he says:

> "The filing of the bond or stipulation discharged the vessel from arrest upon the admiralty process; and the return of the vessel, in the language of Judge Brown, in *The William F. McRae*, 23 Fed. 557 at 558, 'to her owner freed (her) forever from the lien upon which she was arrested, and can never be seized again for the same cause of action'. This was followed by Judge Townsend in *The Mutual*, 78 Fed. 144. Judge Choate in *The Naher*, 9 Fed. 213, said: a vessel 'having given bail * * * was not

liable to be again arrested for the same cause of action' ".

It is proper to note that in *The Haytian Republic*, the supreme court determined that, after release of the Haytian Republic on bond in the District of Washington, she was still liable for seizure on other causes of action in the District of Oregon.

8. Even though the court had power to order the return of the vessel, the libellants contend that the court absolutely ignored the final clause in the condition of the bond, which is as follows: "or, in lieu thereof, shall redeliver said vessel, with her tackle, apparel and furniture, into the possession of the said marshal, *and abide by any such judgment as the same may be rendered, or any orders as the same may be made*, then this obligation be void; otherwise to be and remain in full force and effect." (Italics ours). The stipulation, after redelivery of the vessel, to abide by any such judgment, could only refer to the judgment which the claimant and surety stipulated to pay and abide by in the event the vessel had not been redelivered. In other words, the full performance of the covenant or condition is not met by redelivery of the vessel to the marshal, but must be accomplished, according to the terms of the bond, by abiding by such judgment as the same may be rendered.

9. The obligation of a compensated surety, in executing a bond required by statute or writ of court, is strictly construed.

Duke v. National Surety Co., 30 Wash. Dec., p. 217, where Judge Mackintosh says:

> "The first question for determination is whether the bond is a statutory one, as claimed by the respondent, or a common law bond, as claimed by the appellant. In the determination of this question certain general rules are to be borne in mind. One of these is that, in dealing with the bonds of a compensated surety, they are to be most strictly construed against the surety, and where the terms of such a bond are susceptible of more than one construction the court will adopt that construction most consistent with the purpose to be accomplished, which would be the construction most favorable to the beneficiary". (Quoting Stearn's Suretyship (3d ed.) and other citations). "Another rule is that, in a statutory bond, the provisions of the statute are read into the bond, and if there are conditions contained in such a bond repugnant to the statute, such conditions are to be treated as surplusage." (Quoting authorities).

See, also, *Indemnity Co. v. Granite Co.*, 100 Ohio S. 373, 126 N. E. 405, where the court says:

> "Unlike an ordinary private surety, a surety of the character here involved, which accepts money consideration, has the power to and does fix the amount of its premium so as to cover its financial responsibility. This class of suretyships therefore is not regarded as 'a fav-

orite of the law'. And if the terms of the surety contract are susceptible of two constructions, that one should be adopted, if consistent with the purpose to be accomplished, which is most favorable to the beneficiary."

See, also, Benedict on Admiralty (4th Ed.) Sec. 433.

The conditions of the bond should be construed against the claimant and surety who drew it, and in favor of the obligee.

American Surety Co v. Pauly, 170 U. S. at 144; 42 L. Ed. at 981.

10. The bond in question, given for the release of the "Dauntless" comes within Sec. 941 of the Revised Statutes, and the surety is bound to abide the decree of the court in the cause.

Benedict, Sec. 433;

Monks v. Miller, 66 Fed. 571.

The bond in question can not be considered as a stipulation because it is not conditioned in any respect as are stipulations in admiralty, and the only bond authorized for the release of a vessel under the admiralty practice is the bond in compliance with Sec. 941 of the Revised Statutes, the material portion of which section is as follows:

"SEC. 941. (Delivery bond in admiralty proceedings—permanent bond by vessel owner). When a warrant of arrest or other process *in rem* is issued in any cause of admiralty jurisdiction, except in cases of seizures for forfeiture under any law of the United States, the marshal shall stay the execution of such pro-

> cess, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulatioin shall be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause."

Having been given for a purported compliance with the statute, the conditions imposed by the statute must be read into the bond.

11. Emphasis is laid by the Honorable Trial Court upon the stipulation signed by the proctors for the respective parties for the return of the vessel to the marshal. A reading of the stipulation heretofore noted (Apostles, p. 28) must convince this Honorable Court that the purpose thereof was to avoid further possibility of deterioration, cost or damage, and not in any manner to affect the liability of the claimant and surety to the libellant, at least in the view of the libellant at the time of signing the stipulation.

At the time the order for return of the vessel was made by the court, August 15th, said vessel was then in the possession of the marshal under monition issued under the libel of C. R. Hooper.

Apostles, p. 46.

So that the order for redelivery did not in fact accomplish its purpose because the vessel was then in the custody of the marshal, an officer of the court, under the Hooper libel, and it certainly can not be contended that the surety can be relieved of its responsibility on the delivery bond given for the release of the vessel issued under the original libel by a technical return or surrender of the vessel when at the time of her purported delivery back to the marshal, she was already in the possession of the marshal.

It is, therefore, respectfully submitted that the court erred in releasing the surety from its obligation to pay the judgment rendered by the court in favor of the libellant, Seattle Shipbuilding & Dry Dock Company.

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